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Supreme Court, U.S.
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CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

OHIO CITIZENS FOR
RESPONSIBLE ENERGY, INC.,

Petitioner,

vs.

NUCLEAR REGULATORY COMMISSION and
THE UNITED STATES OF AMERICA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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February 20, 1987

QUESTION PRESENTED FOR REVIEW

Whether an order of the Nuclear Regulatory Commission which denies an intervenor its right to participation in adjudicatory proceedings before the issuance of a full-power operating license is a "final order" for purposes of review by the court of appeals?

PARTIES TO THE PROCEEDINGS

PETITIONER:

Ohio Citizens for Responsible Energy, Inc.

RESPONDENTS:

United States Nuclear Regulatory Commission

United States of America

INTERVENORS:

Cleveland Electric Illuminating Company

Duquesne Light Company

Ohio Edison Company

Pennsylvania Power Company

Toledo Edison Company

TABLE OF CONTENTS

Question Presented For Review i

Parties To The Proceedings ii

Opinions Below 2

Jurisdiction 3

Statutory Provisions Involved 3

Statement of the Case 4

A. Administrative Proceedings . . . 6

B. Court of Appeals Proceedings . . 10

Reasons for Granting the Writ 13

A. The April 18, 1986 Order of the Commission of the NRC which denied the Petitioners a hearing before the agency on a safety significant matter, was a "final order" for purposes of review by the Court of Appeals 14

B. The April 18, 1986 Order of the Commission is reviewable by the Court of Appeals under the "Collateral Order" Doctrine . . 21

Conclusion 25

Table of Contents (continued)

INDEX TO APPENDICES

Appendix A. Orders and Opinions of The United States Court of Appeals for the Sixth Circuit in No. 86-3355.

Appendix B. Nuclear Regulatory Commission Decision.

Appendix C. Statutory Provisions Involved.

TABLE OF AUTHORITIES

CASES	Page
Aldinger v. Howard, 427 U.S. 1 (1976)	19
Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728 (1982)	24
Braen v. Pfeifer Transportation Co., 361 U.S. 129 (1959)	24
Chicago & Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103 (1948)	19
Citizens For a Safe Environment v. AEC, 489 F.2d 1018 (3rd Cir. 1974)	16
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	22, 25
Commission v. Bilder, 369 U.S. 499 (1962)	20
Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971)	17
Florida Power and Light Co. v. Lorion, 466 U.S. ___, 104 S. Ct. 1676 (1984)	19, 20
Florida Power and Light Co. v. Lorion, ___ U.S. ___, 105 S. Ct. 1598 (1985)	20

Table of Authorities (continued)

Page

CASES (continued)

Honicker v. NRC, 590 F.2d 1207 (D.C. Cir. 1978) cert. denied 441 U.S. 906 (1979) 19

Isbrandtsen v. United States, 211 F.2d 51, (D.C. Cir. 1954), cert. denied, 347 U.S. 900 (1954) 17, 19

McCandless v. Furlaud, 296 U.S. 140 (1935) 24

Minnesota Mining Co. v. New Jersey Wood Co., 381 U.S. 311 (1965) 19

Mitchell v. Forsyth, ___ U.S. ___, 105 S. Ct. 2806 (1985) 22, 25

Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970). . 18

Schlude v. Commissioner, 372 U.S. 128 (1968) 24

Shapiro v. United States, 335 U.S. 1 (1948) 19

Upshaw v. United States, 335 U.S. 410 (1948) 24

Westinghouse Electric Corp. v. U.S. Nuclear Regulatory Commission, 598 F.2d 759 (3rd Cir. 1979) 16, 17

Wilkinson v. United States, 365 U.S. 399 (1961) 24

Table of Authorities (continued)

	Page
CASES (continued)	
Writers Guild of America v. FCC, 423 F. Supp. 1064, (C.D. Cal. 1976)	17
ADMINISTRATIVE DECISIONS	
Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant, Units 1 and 2), 14 NRC 175 (1981)	4, 5
STATUTES	
28 U.S.C. § 2342(4) . . .	3, 10, 15, 16
42 U.S.C. § 2239(a)	3, 5, 10
MISCELLANEOUS	
46 Fed. Reg. 12,372	4
51 Fed. Reg. 29,043	9

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NUCLEAR REGULATORY COMMISSION and
The UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner, The Ohio Citizens for Responsible Energy, Inc. (OCRE)[1], respectfully prays that a writ of certiorari issue to review the 2-1 decision of

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[1]Petitioner, OCRE, is a private, non-profit corporation organized under the laws of the State of Ohio. OCRE states that it has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 14, 1986.

OPINIONS BELOW

On September 4, 1986, the Court of Appeals issued an order staying a vote by the Nuclear Regulatory Commission (NRC) on the issuance of a full-power operating license for the Perry Nuclear Power Plant and the order is unpublished. The Opinion of the Court of Appeals was entered on October 14, 1986, and is published at 803 F.2d 258 (6th Cir. 1986). Following petitioner's application for rehearing en banc, the Court of Appeals denied the application on November 25, 1986, and the order is unpublished. The Opinion and Orders are reproduced in the Appendix hereto, at A-1-12.

The NRC decision reviewed was issued on April 18, 1986. The decision is published at 23 NRC 233. The decision is reproduced in the Appendix hereto at B-1-17.

JURISDICTION

The final judgment that is the focus of this petition was entered on November 25, 1986.

The jurisdiction of the Court rests upon Title 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved in this case are set forth in Appendix C-1-5. Those being referred to are:

1. 28 U.S.C. § 2342(4)
2. 42 U.S.C. § 2239(a)

STATEMENT OF THE CASE

The Cleveland Electric Illuminating Co. (CEI) filed its operating license application for the Perry Nuclear Power Plant Units 1 and 2 (Perry) with the NRC on June 26, 1980. In February 1981, the NRC published notice of "Receipt of Application for Facility Operating Licenses, Consideration of Issuance of Facility Operating Licenses, and Opportunity for Hearing."[2] This notice provided an opportunity for any person whose interest might be affected by the proceeding to request a hearing and file a petition for leave to intervene.

By order dated July 28, 1981[3] the Atomic Safety and Licensing Board (Licensing Board) made determinations

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[2] 46 Fed. Reg. 12,372 (February 13, 1981).

[3] Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant, Units 1 and 2, 14 NRC 175 (1981).

concerning party status. OCRE and a number of other individuals and groups were granted party status as intervenors in the licensing proceedings.[4]

The proceeding before the Licensing Board of the NRC was conducted pursuant to Section 189(a) of the Atomic Energy Act. 42 U.S.C. § 2239(a). The proceedings concerned CEI's application for an operating license for its two 1205 MWe boiling water reactors for the Perry Plant located in Lake County, Ohio, approximately 35 miles northeast of Cleveland, on the shores of Lake Erie. The hearing record before the Licensing Board was closed on May 3, 1985.

At 11:46 a.m. E.S.T. on January 31, 1986, an earthquake of magnitude 5.0 occurred 10 miles south of the Perry Plant. The earthquake was felt 300

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[4] 14 N.R.C. 175.

miles away and there were reports of cracked walls, shattered windows, and falling roof tiles near the epicenter of the earthquake. There were several aftershocks which were recorded.

A. ADMINISTRATIVE PROCEEDINGS

On February 3, 1986, petitioner filed a Motion to Reopen the Record and Submit a New Contention with the Atomic Safety and Licensing Appeal Board (Appeal Board). OCRE sought to reopen the record for the purpose of submitting and litigating one contention regarding the inadequacy of the seismic design of the Perry Plant in light of the local earthquake.[5] Prior to the unexpected seismic activity, the earthquake conten-

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[5]The contention proposed by OCRE was as follows:

"Applicants have not demonstrated that the seismic design of the Perry Nuclear Power Plant is adequate in light of observed local seismicity."

[Footnote continued, next page]

tion was not an issue and therefore not reviewed by the Licensing Board during the period the record was being developed before the agency.

The Appeal Board issued a Memorandum and Order (unpublished) to hold a hearing with a limited purpose, "...to aid our determination on whether there is warrant to reopen the record for the admission and full litigation of OCRE's newly proposed seismic contention...".

The Appeal Board determined OCRE had good reason to file its motion before the implications of the earthquake on the nuclear facility could be ascertained. "[I]t was enough for OCRE to call attention to the apparent fact that the earthquake exceeded the design basis

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[footnote continued]
OCRE based its contention on preliminary information. At the time of the filing of the Motion, detailed information regarding the seismic activity was still lacking.

SSE (Safe Shutdown Earthquake) in at least one respect."

The Appeal Board determined OCRE presented "evidence of a significant safety matter...". The Appeal Board however determined it was "difficult to make an informed judgment on the basis of preliminary written materials where, as here, the combined and complicated fields of geology, seismology, and engineering mechanics come into play." The Appeal Board had several questions which it felt required further explanation before it could decide with confidence whether the reopening of the record would be justified.

On April 18, 1986, the Commission of the NRC, sua sponte, issued an order vacating the March 20 Appeal Board Order and denying OCRE's motion; the Commission held if the Appeal Board "was not convinced that the motion raised a

matter of safety significance, it should have denied the motion to reopen." Appendix B at 4. In vacating the Appeal Board's order to hold exploratory hearings and denying OCRE's motion to reopen the proceedings, the Commission determined matters could be addressed by the staff outside of the adjudicatory context. The Commission further decided the earthquake had already received a great deal of attention by the NRC staff. Appendix B at 7.

On August 13, 1986, the Commission published notice in the Federal Register that a discussion and possible vote on the full-power operating license for the Perry Plant would be held on September 5, 1986.[6] On August 27, OCRE filed a Motion for a Continuance of the briefing and vote with the Commission

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[6] 51 Fed. Reg. 29,043 (August 13, 1986).

and the motion was denied on September 4, 1986.

B. COURT OF APPEALS PROCEEDINGS

On April 23, 1986, pursuant to 28 U.S.C. § 2342(4) ("Hobbs Act"); 28 U.S.C. § 2343; and 42 U.S.C. § 2239(a), OCRE filed a Petition for Review in the United States Court of Appeals for the Sixth Circuit. OCRE alleged in its petition, inter alia, that the NRC violated section 189(a) of the Atomic Energy Act of 1954 [42 U.S.C. § 2239(a)] by summarily denying the petitioner a hearing on an issue of material safety significance regarding the licensing of the Perry Plant. OCRE requested the Court of Appeals remand the matter to the Appeal Board with an order to reopen the record and hold a hearing on the new contention or, in the alternative, reinstate the order of the Appeal Board

to hold a "mini hearing" on the earthquake issue.

The NRC scheduled a vote on the issuance of a full-power operating license for Perry and after requesting a continuance on the vote from the NRC, the petitioner filed an Emergency Motion in the Court of Appeals to stay the briefing and possible vote scheduled for September 5, 1986 by the Commission. On September 4, 1986, the Court of Appeals stayed "any possible vote" on the issuance of a full-power operating license for the Perry Plant by the NRC. Appendix A at 2.

On October 14, 1986, the Court of Appeals held it did not have jurisdiction to entertain the petition for review until a final order was issued by the agency. The Court concluded, "in licensing proceedings before the NRC, a final order is the order granting or

denying a license. Appendix A at 8. OCRE filed a Petition for Rehearing en banc on October 23, 1986 and the Court of Appeals denied the petition on November 25, 1986.[7]

The petitioner filed an Application To Stay Mandate of the United States Court of Appeals for The Sixth Circuit in this matter in the Supreme Court on January 6, 1987. The petitioner sought to stay full-power operations of Perry pending certiorari proceedings in this Court. On January 8, 1987, Justice Antonin Scalia, as Circuit Justice for the Sixth Circuit, denied the stay

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[7]On November 13, 1986, the NRC staff issued the full-power operating license for Perry. On the same date, the Court of Appeals for the Sixth Circuit stayed full-power operation of Perry in State of Ohio, ex rel. Celebrezze v. NRC, 86-4019 (6th Cir. filed Nov. 7, 1986). On November 14, the petitioner filed a Petition for Review with the Sixth Circuit. Ohio Citizens for Responsible Energy v. NRC, No. 86-4037 (6th Cir. filed Nov. 14, 1986). On the same date, [Footnote continued, next page]

application by endorsed order. Ohio Citizens for Responsible Energy v. Nuclear Regulatory Commission, et al., A-499 (January 8, 1987).

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for writ of certiorari. The Court of Appeals has jurisdiction under the "Hobbs Act" to review "final orders" arising out of proceedings involving the granting, suspending or amending of licences under the Atomic Energy Act. This Court has not defined "final order"

[footnote continued]
the State of Ohio filed a second Petition for Review. State of Ohio, ex. rel. Celebrezze v. NRC, No. 86-4038 (6th Cir. filed Nov. 14, 1986). The Court of Appeals consolidated all three matters and heard arguments on December 3, 1986. On December 23, 1986, the Court of Appeals lifted the stay on full-power operation of Perry. As of the filing of this petition, the Sixth Circuit has not issued on opinion in the above matters.

under the "Hobbs Act" and the holding of the court below is in conflict with a holding of the Third Circuit which determined what a "final order" is under the "Hobbs Act" for purposes of review by the courts of appeals.

Second, the Court of Appeals did not apply the "collateral order" doctrine to the facts and circumstances of the instant matter. The Court of Appeals was in a position to maintain jurisdiction over the petition for review and decide the merits of the petitioner's claim prior to the issuance of the full-power operating license for the Perry Plant.

(A) THE APRIL 18, 1986 ORDER OF THE COMMISSION OF THE NRC WHICH DENIED THE PETITIONER A HEARING BEFORE THE AGENCY ON A SAFETY SIGNIFICANT MATTER, WAS A "FINAL ORDER" FOR PURPOSES OF REVIEW BY THE COURT OF APPEALS.

The Court of Appeals has jurisdiction to review "final orders" arising out of

proceedings involving the granting, suspending or amending of licenses under the Atomic Energy Act pursuant to 28 U.S.C. § 2342. 28 U.S.C. § 2342 is known as the Administrative Orders Review Act or the "Hobbs Act".

The Administrative Orders Review Act provides "The Court of Appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of -- (4) all final orders of the Atomic Energy Commission made reviewable by [section 189(a) of the Atomic Energy Act]." 28 U.S.C. § 2342(4). 28 U.S.C. § 2342(4) applies to the Nuclear Regulatory Commission. 42 U.S.C. § 5871(g) (1982).

The majority below determined in "licensing proceedings before the NRC, a final order is the order granting or denying a license." Appendix A-8. This conclusion is contrary to the term

"final order" as defined by the Third Circuit under the "Administrative Orders Review Act". 28 U.S.C. § 2342.

In Citizens For a Safe Environment v. AEC, 489 F.2d 1018 (3rd Cir. 1974), the petitioners sought review of the Commission denial of their request for financial and technical assistance. The court determined "[n]ormally in an adjudication a final order is one that disposes of all the issues as to the parties." Id. at 1021. Five years later, the Third Circuit was faced with a similar situation and took that opportunity to define "final order" when it was asked to dismiss a matter for want of jurisdiction.

The Third Circuit, in Westinghouse Electric Corp. v. U.S. Nuclear Regulatory Commission, 598 F.2d 759 (3rd Cir. 1979), found the term "final order" to be broader in scope than the court

below held. The court, citing Writers Guild of America v. FCC, 423 F. Supp. 1064, 1079 (C.D. Cal. 1976), adopted the view that a final order under the Administrative Orders Review Act has never been interpreted to include the culmination of all agency action. Westinghouse Electric, 598 F.2d at 765-766, n. 21. The court also found a "final order" to be one which contained the "essential attributes of finality". Id. at 768, n. 35. "A final order need not necessarily be the very last order in the agency proceeding," so long as it attaches consequences or harm to the petitioner. Isbrandtsen v. United States, 211 F.2d 51, 55-56, (D.C. Cir. 1954), cert. denied, 347 U.S. 900 (1954).

In Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), the petitioners sought review of

the Secretary of Agriculture's refusal to act and the inadequate explanation for his decision. The court found the "denial was reviewable as a final order because of its immediate impact on the parties". Id. at 589. "The test of finality for purposes of review is not whether the order is the last administrative order contemplated by the statutory scheme, but rather whether its impact imposes an obligation or denies a right with consequences sufficient to warrant review." Id.

When looking to finality of an order, courts have looked to whether judicial review would disrupt the orderly process of adjudication; Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970); or whether the order imposed "an obligation, den[ied] a right or fix[ed] some legal relationship as a consum-

mation of the administrative process". Chicago & Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103, 113 (1948); see also Honicker v. NRC, 590 F.2d 1207, 1209 (D.C. Cir. 1978) cert. denied 441 U.S. 906 (1979). "A final order need not necessarily be the very last order in the agency proceeding," so long as it attaches consequences or harm to the petitioner. Isbrandtsen v. United States, 211 F.2d 55-56.

This Court has granted certiorari in matters because of "a conflict among the Circuits in order to resolve conflicts on important questions; Aldinger v. Howard, 427 U.S. 1,3 (1976), or because of a question of important statutory construction. See Shapiro v. United States, 335 U.S. 1,4 (1948); Minnesota Mining Co. v. New Jersey Wood Co., 381 U.S. 311, 314 (1965). See also Florida Power and Light Co. v. Lorion, 466 U.S.

____, 104 S. Ct. 1676, 1677 (1984). There is a need for a uniform rule on this point and this Court has granted certiorari in order to establish such. Commission v. Bilder, 369 U.S. 499, 501 (1962).

This Court recently had an opportunity to consider the "Hobbs Act" in Florida Power & Light Co. v. Lorion. ___ U.S. ___, 105 S. Ct. 1598 (1985). The Court was asked to determine whether the Hobbs Act vested exclusive jurisdiction in the courts of appeals to review all final orders of the NRC made reviewable by 42 U.S.C. § 2239. This Court however never defined what constituted a "final order" of the NRC for purposes of review by the courts of appeals.

The petitioner contends the April 18, 1986 Order of the Commission was a "final order" of the NRC. The order was

not the last order in all the proceedings before the agency but that, in and of itself, does not deprive the court of appeals of jurisdiction.

The relief the petitioner is seeking from this Court is to be given the opportunity to be heard as provided in the Atomic Energy Act. The petitioner seeks review in this Court, because the Commission Order has all the attributes of finality: it was issued after the record was closed; it deprives the petitioner of its right to participate in an adjudicatory proceeding; and harm and consequences attach to OCRE as a result of the Order.

(B) THE APRIL 18, 1986 ORDER OF THE COMMISSION IS REVIEWABLE BY THE COURT OF APPEALS UNDER THE "COLLATERAL ORDER" DOCTRINE.

The April 18, 1986 Order of the Commission is appealable under the

"collateral order" doctrine as outlined in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). A decision is appealable if the claims are separable from and collateral to other rights asserted. These claims are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Mitchell v. Forsyth, ____ U.S. ____, 105 S. Ct. 2806, 2815 (1985); quoting Cohen, 337 U.S. at 546.

There were other issues which the petitioner may have challenged after the operating license for Perry was issued. The difference between "other issues" and the issue herein, is that the Licensing Board, the Appeal Board and the Commission made decisions based on a full and complete record which was developed before the agency in deter-

mining the "other issues." Further, the petitioner as an intervenor in the proceedings before the agency, was given the opportunity to, and did in fact participate in the proceedings as to the "other issues." The petitioner contributed to the record and was given the chance to cross-examine the testimony and evidence of the NRC Staff and the Utility as provided by statute and regulation.

The instant matter is different. The petitioner was denied its right to participate in licensing proceedings on an issue of significant safety importance through the intrusion of the Commission. The petitioner was denied the opportunity to contribute to the record within the adjudicatory context. This important right is clearly collateral to and independent from any future court challenge to the proceedings which

were had before the agency. This right to participate will effectively be lost once the Perry Plant is operating at full-power.

This Court has granted certiorari when the courts of appeals have allegedly misconstrued, misapplied or misconceived applicable Supreme Court opinions. See McCandless v. Furlaud, 296 U.S. 140 (1935); Upshaw v. United States, 335 U.S. 410 (1948); Wilkinson v. United States, 365 U.S. 399, 401 (1961); Schlude v. Commissioner, 372 U.S. 128, 130 (1968). The Court has also granted certiorari where the decision below seemed to be out of line with the authorities or appeared to be in conflict with precedents. See Braen v. Pfeifer Transportation Co., 361 U.S. 129, 130 (1959); Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 733 (1982).

The decision below clearly did not apply the "collateral order" doctrine to the facts and circumstance of the instant matter. If Cohen and Forsyth had been applied in the appropriate manner, the court below would have been in the position to maintain jurisdiction over the Petition for Review and decide the merits of the petitioner's claim prior to the issuance of the full-power operating license for Perry.

CONCLUSION

The Ohio Citizens for Responsible Energy has been an intervenor before the NRC in the licensing proceeding for Perry for over five years. The petitioner has consistently participated in the proceedings before the agency and followed the course as outlined by statute and regulation. The petitioner has contended throughout these

proceedings that the right to be heard on the unexpected significant earthquake before the full-power license is issued and the plant operates at full-power is based upon statute and regulation. The opportunity to participate in the adjudicatory proceedings before the licensee is allowed to operate at full-power is paramount.

The Order of the Commission which is the subject of the Petition For Review is a "final order" under the Administrative Orders Review Act and subject to review by the court of appeals. Further, the order contains "essential attributes of finality and attaches consequences and harm" to the petitioner. An order need not be the very last order in the agency proceedings to be considered a "final order" for purposes of judicial review. Finally, if the court below had applied

the "collateral order" doctrine, it would have been able to maintain jurisdiction and review the merits of the claim of the petitioner.

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

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February 20, 1987

APPENDIX

No. 86-3355

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC.,	)	
Petitioner,	)	
v.	)	ORDER
NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,	)	
Respondents.	)	

BEFORE: JONES, MILBURN and NELSON, Circuit Judges

This matter is before the Court upon consideration of petitioner's emergency motion to stay the September 5, 1986, Nuclear Regulatory Commission's meeting concerning the Perry Nuclear Power Plant. The Intervenor and Respondents have responded.

Upon consideration of the documents which were filed with this Court, it appears that petitioner has met the criteria for granting a stay. Tate v. Frey, 735 F.2d 986 (6th Cir. 1984). The gravity of the issues raised herein is such as to prompt this Court to resolve its doubts in favor of granting a delay.

It is ORDERED that the motion for stay be denied as to the September 5, 1986, meeting of the Nuclear Regulatory Commission but granted as to any possible vote on the Perry Nuclear Power Plant. The case is directed to be expedited and the parties to brief, among other issues, the issue of jurisdiction of this Court.

Judge Nelson dissents from this order, believeing that a "possible vote" on the granting of a full-power operating license (51 Fed. Reg. 29043,

August 13, 1986) is neither a "decision or order" that this Court is empowered to stay under Rule 18, Federal Rules of Appellate Procedure, nor an "action" the effective date of which may be postponed under 5 U.S.C. § 705.

ENTERED BY ORDER OF THE COURT

Clerk

No. 86-3355

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC., *Petitioner,* v. NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, *Respondents,* and CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al., *Intervenors.*	ON PETITION to Review an Order of the United States Nuclear Regulatory Commission.

Decided and Filed October 14, 1986

Before: MARTIN, JONES and MILBURN, Circuit Judges.

MILBURN, Circuit Judge, delivered the opinion of the court, in which MARTIN, Circuit Judge, joined. JONES, Circuit Judge, (p. 7) delivered a separate dissenting opinion.

MILBURN, Circuit Judge. This matter is before the court on a request to reconsider the order entered by this court on

September 4, 1986, wherein we directed that any possible vote on the full-power operation of the Perry Nuclear Power Plant be stayed pending this hearing. By this opinion we dissolve our stay order and dismiss the petition for review filed by the Ohio Citizens for Responsible Energy, Inc., because we find that the order denying the petitioner's motion to reopen the proceedings before the Appeal Board of the Nuclear Regulatory Commission was not a final order.

I.

Ohio Citizens for Responsible Energy, Inc. (OCRE) was permitted to proceed in the licensing procedure of the Perry Nuclear Power Plant as an intervenor. The plant was operating at 5 per cent power when on January 31, 1986, an earthquake of 5.0 magnitude occurred ten miles south of the plant. The plant was designed to withstand .15 g (a "g" is a measure of ground acceleration in relation to gravity during an earthquake). However, the January earthquake was estimated to have generated between .19 and .25 g.

Three days after the quake, OCRE filed a motion to reopen the record and submit a new contention to the Atomic Safety and Licensing Appeal Board in light of the earthquake. Newspaper articles were submitted in support of the motion to reopen. In response to the motion, the Nuclear Regulatory Commission (NRC) and the applicant presented extensive technical data refuting the contention that the earthquake was safety significant. The Appeal Board determined that OCRE presented "evidence of a significant safety matter" but that it was "difficult to make an informed judgment on the basis of preliminary written materials where, as here, the combined and complicated fields of geology, seismology, and engineering mechanics come into play." The Appeal Board decided to hold an exploratory hearing to aid in its determination of whether or not to reopen the Perry Power Plant hearing on the issue of seismic design.

On April 17, 1986, the Nuclear Regulatory Commission held a sua sponte meeting to address the decision of the

Appeal Board to hold an exploratory hearing. The Commission found that its "inherent supervisory authority over the conduct of NRC adjudications" gave it the authority to intervene in the matter. After considering the instant case in light of the standards established for reopening records, the Commission vacated the Board's order setting an exploratory hearing and denied the motion to reopen.

OCRE filed a petition to review the Commission's order in this court on April 23, 1986. On August 13, 1986, the Commission published notice in the Federal Register that a discussion and possible vote on the full-power operating license for the Perry Plant would be held on September 5, 1986. On August 27, 1986, OCRE was notified of the meeting and on the same date filed a motion for continuance of the hearing with the Commission. The Commission denied the motion on the afternoon of September 4.

An emergency motion for stay of agency proceedings was filed in this court on September 3, 1986. The respondents' and intervenors' responses to the motion for stay argued that this court lacked jurisdiction. This court on September 4, 1986, stayed any voting on the Perry license, but denied a stay of the September 5 meeting of the Commission and directed that the case be expedited for hearing on the jurisdictional issue.

On September 8, a motion for expedited reconsideration was filed by the respondent, and a motion for expedited briefing and argument was filed by the intervenors. Reconsideration was denied, and an expedited briefing schedule was set by this court by order entered September 10, 1986. On September 25, 1986, the parties appeared before this court to argue the jurisdictional issue.

II.

This court has jurisdiction under 28 U.S.C. § 2342 to review "all *final* orders of the Atomic Energy Commission

made reviewable by section 2239 of title 42." (emphasis supplied). This court has never defined the term "final order"; however, in making this determination we are guided by well-reasoned precedent from other jurisdictions.

In *Thermal Ecology Must Be Preserved v. Atomic Energy Commission*, 433 F.2d 524 (D.C. Cir. 1970) (per curiam), the District of Columbia Circuit declined to consider an appeal from the NRC's order refusing to allow petitioners to offer certain evidence in the course of proceedings. The court held that " [a]n agency's procedural or evidentiary rulings in the course of a proceeding do not constitute a final order justifying judicial review. . . . [T]he availability of relief from the final order granting a certificate is sufficient to preclude the ruling denying admission of evidence from being considered a final order." *Id.* at 526. *See Ecology Action v. United States Atomic Energy Commission*, 492 F.2d 998 (2d Cir. 1974) (prehearing conference order excluding certain issues from consideration in construction proceedings was not a final order subject to judicial review).

We agree that interlocutory orders such as those considered in *Ecology Action* and *Thermal Ecology* should not be reviewed by this court. Although *Ecology Action* recognized that interlocutory review may be appropriate under certain circumstances, the exception "should be limited to cases where the [interlocutory] ruling is so flagrantly wrong and demonstrably critical as to make it apparent that the agency is not merely courting the possibility of reversal but is running into the certainty of it. . . ." 492 F.2d at 1001.

In the instant case, we cannot conclude that interlocutory review is appropriate. The Commission's determination that the standards for reopening have not been met is supported by its decision in *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 N.R.C. 1 (1986), *aff'd. Oystershell Alliance v. NRC*, _ F.2d _, No. 85-1182 (D.C. Cir. 1986) (per curiam). The only documentation supporting the petitioner's motion to reopen was a newspaper

article. Conversely, respondents presented extensive evidence in opposition to the motion. Accordingly, we hold that the refusal to reopen under these circumstances was not so "flagrantly wrong" as to justify judicial intervention at this stage of the proceedings.

We conclude that, in licensing proceedings before the NRC, a final order is the order granting or denying a license. *See Natural Resources Defense Council, Inc. v. NRC*, 680 F.2d 810 (D.C. Cir. 1982); *Citizens for a Safe Environment v. Atomic Energy Commission*, 489 F.2d 1018 (3d Cir. 1974). The District of Columbia Circuit's decision in *Oystershell Alliance v. NRC*, _ F.2d _, No. 85-1182 (D.C. Cir. September 9, 1986) (per curiam), strongly supports our conclusion. In *Oystershell Alliance*, petitioners argued that their motions to reopen the licensing proceedings should have been decided before the Commission authorized full-power operation. The court disagreed, concluding that the Commission's decision to license after examining all relevant evidence and determining that the plant could be operated safely, was "well within the Commission's discretion." Slip op. at 10.

The court also affirmed the Commission's decisions denying the motions to reopen. "Where as here the agency has taken final action on a matter that is peculiarly within its realm of expertise, we will not require the agency to reopen its proceedings except upon a clear showing of abuse of discretion or of extraordinary circumstances." *Id.* at 12 (quoting *Mobil Oil Corp. v. ICC*, 685 F.2d 624 (D.C. Cir. 1982). Implicit in the court's entire discussion is the notion that review of the final licensing decision is the appropriate proceeding in which to consider all objections.

We conclude that the analysis utilized in the decisions discussed above is the appropriate one for use in reviewing licensing decisions of the NRC. Because review of the final licensing decision may encompass all challenges raised in the proceeding, such review will be withheld until a final decision is issued.

III.

The stay prohibiting a final vote on the full-power license is hereby dissolved, and the petition for review is dismissed.

JONES, Circuit Judge, Dissenting. I respectfully dissent from the majority's decision that this court lacks jurisdiction in this case. I believe that the order denying petitioner's motion to reopen the record is appealable under the "collateral order" doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Supreme Court has declared that an order is final for the purposes of appeal when it meets the following criteria: 1) the order must be effectively unreviewable unless it is reviewed immediately; 2) it must conclusively determine the disputed question; and 3) it must involve a claim of right separable from, and collateral to, rights asserted in the action. *Mitchell v. Forsyth*, 105 S.Ct. 2806 (1985).

The claim of right decided by the denial to reopen the record is the right of the citizens group to participate in an adjudicatory proceeding before the licensing of the nuclear plant. This right to participate is effectively lost once a license has been granted. This right is conclusively denied by the decision not to reopen the record. Most significantly, it is a claim of right separate from the merits of licensing the plant. Even if the plant is not licensed, petitioner's right to participate in the decisionmaking process will still have been infringed. Thus, it is incorrect to imply that the merits of the order are not "ripe" for adjudication until the license itself has been either granted or denied.

For these reasons I would find the order to be final and appealable.

No. 86-3355

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC.,	)	
Petitioner,	)	
v.	)	ORDER
NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,	)	
Respondents.	)	

BEFORE: MARTIN, JONES and MILBURN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has

been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Lando W. Zech, Jr.

In the Matter of	)	
	)	Docket Nos.
CLEVELAND ILLUMINATING ILLUMINATING COMPANY ET AL.	)	50-440 OL
	)	50-441 OL
(Perry Nuclear Power Plant, Units 1 and 2)	)	

MEMORANDUM AND ORDER

CLI-86-07

I.

For the reasons set forth below, the Commission has determined that the Atomic Safety and Licensing Appeal Board's actions in this proceeding warrant intervention in order to clarify a misinterpretation of Commission case

law and precedent. The Commission's inherent supervisory authority over the conduct of NRC adjudications gives it the authority to intervene.

On January 31, 1986, an earthquake occurred in northeastern Ohio. The earthquake measured 5.0 in magnitude and its epicenter was located approximately ten miles south of the Perry nuclear facility. Three days later, on February 3, intervenor Ohio Citizens for Responsible Energy (OCRE) filed a motion to reopen the record in the Perry operating license proceeding for the purpose of admitting a new contention challenging the adequacy of the facility's seismic design. The Applicants and Staff opposed the motion to reopen primarily on the ground that the earthquake and its effects did not present a significant safety question. The Appeal Board, unable to decide whether the

issue raised by the motion to reopen had true safety significance, decided to hold an exploratory hearing to aid it in its determination of safety significance. See Appeal Board Orders of March 20 and April 8, 1986 (unpublished).

II.

The standards for reopening a closed record require consideration of three factors: (1) whether the motion to reopen is timely; (2) whether the information raises a significant safety (or environmental) concern; and (3) the motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 311 (1985).

The Board, in its analysis of the motion to reopen, found that the motion to reopen was timely. Order of March 20, 1986 at 4 n.7. However, the Board was not convinced that the motion had safety significance. If the Board, after considering the parties' submissions, was not convinced that the motion raised a matter of safety significance, it should have denied the motion to reopen.

In Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1 (1986), we addressed the issue of whether an Appeal Board has the authority to seek additional information before ruling on a motion to reopen. Our Waterford decision holds that a Board is to decide the motion to reopen on the information before it and has no authority to engage in discovery in order to supplement the pleadings before it. Simply put, the

burden of satisfying reopening requirements is on the movant, and Boards must base their decisions on what is before them. That the movant did not meet this burden in the view of the Appeal Board is evident from the Board's order of April 8, 1986, in which it states that it needs the exploratory hearing to aid its "determination respecting whether the new issue raised by the OCRE motion has true safety significance." (Emphasis added.) Accordingly, the Board had no authority to pursue this matter as it did.[1] See also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-7, 21 NRC 1104, 1106 (1985).

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[1]Nor did the Appeal Board here have the authority sua sponte to seek to obtain information relevant to the motion to reopen. Boards have the authority to examine issues not placed in controversy by the parties only where [footnote continued, next page]

Additionally, we note that OCRE in its reply to the Staff and Applicant responses in opposition to its motion to reopen conceded "that the high frequency exceedances of the SSE design acceleration recorded in the January 31, 1986 earthquake do not have engineering significance." OCRE Reply to Staff and Applicant Responses to OCRE's Motion to Reopen the Record and to Submit a New Contention at 1. OCRE also concedes that the earthquake caused little or no damage to the plant. Id. Assuming arguendo, that the Appeal Board was correct in stating that the burden of going forward shifted to the Applicants

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[footnote continued]
specific facts are brought to their attention indicating that there is a serious safety, environmental, or common defense and security matter. See 10 C.F.R. § 2.760a; Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614, 615 (1981). The Appeal Board made no such finding here.

and Staff when OCRE called "attention to the apparent fact that the earthquake exceeded the design basis SSE in at least one respect," these concessions appear to negate any prima facie case of safety significance. See Order of March 20, 1986 at 4 n.7 and at 6.

The earthquake has already received a great deal of attention. The NRC staff has already completed one study (SSER No. 9) and some additional confirmatory work must be completed before the granting of a full-power license. Matters which need to be addressed before licensing can be handled by the Commission and its Staff outside of the adjudicatory context. See Cincinnati Gas and Electric Company. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, 16 NRC 109 (1982).

III.

The Appeal Board's orders setting up the exploratory hearings are VACATED. The petition to reopen is DENIED. The Staff, however, should be prepared to discuss the matters raised by the Board in its March 20, 1986 Order in its presentation before the Commission on the full-power license. The Applicants and the Intervenor will also be afforded an opportunity to make presentations to the Commission on these matters.

Chairman Palladino has additional remarks which are attached. Commissioner Asselstine disapproved this Order; his dissenting views are attached.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 18th day of April, 1986.

SEPARATE VIEWS OF CHAIRMAN PALLADINO

While I support the Waterford Doctrine referred to in the Commission's order, I would have sought clarification of the Appeal Board's reasons behind its March 20, 1986 order.

Notwithstanding the above, I find compelling the fact that Intervenor has abandoned the theory of their February 3, 1986 motion to reopen the record as described in the Commission's order. Thus, I support the Commission's order denying the motion to reopen.

DISSENTING VIEWS OF COMMISSIONER ASSELSTINE

I do not agree with the Commission's action today. The Commission should not have interposed itself into the Appeal Board proceeding but should simply have permitted the Appeal Board to proceed as it outlined in its orders. At a minimum, the Commission should not have summarily vacated the Board's orders and summarily denied the motion to reopen without first hearing from the parties.

The action of the Appeal Board in this case is an eminently sensible solution to a difficult problem. The Board was told that, in at least one respect, the 1986 Ohio earthquake exceeded the SSE for the Perry plant.[1] The Applicants and NRC Staff asserted that, even though the earthquake did exceed the SSE, the event did not present a significant safety issue for operation of Perry. The Appeal Board felt, however, that it needed more information before it could make a final determination of safety significance.

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[1] In its Order (p. 236), the Commission seems to attach some significance to the fact that OCRE has conceded in its response to Staff and Applicant filings "that the high frequency exceedances of the SSE design acceleration recorded in the January 31, 1986 earthquake do not have engineering significance" and that the earthquake caused little or no damage to the plant. This is largely irrelevant to the question at issue here. The Intervenor has not abandoned its claim that the earthquake raises questions about the adequacy of the seismic [Footnote continued, next page]

The Board stated:

> Even with regard to so seemingly simple an issue as safety significance, it is difficult to make an informed judgment on the basis of preliminary written materials where, as here, the combined and complicated fields of geology, seismology and engineering mechanics come into play. In this connection, our examination of the documentary submissions of the Applicants and Staff have given rise to several questions that, in our view, require further exploration before we can decide with any degree of confidence whether a reopening of the record is justified.

Appeal Board Order dated March 20, 1986, at 6.

Given these circumstances, the Appeal Board decided to hold a 1-day "mini hearing" to obtain answers to its questions in order to make a decision on whether the Ohio earthquake presents a significant safety issue. Thus, the Board established a procedure by which

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[footnote continued]
design basis for the plant and of compliance with NRC regulations. These are the very subjects on which the Appeal Board wished to obtain additional information from the Applicants and Staff..

it could ensure an adequate examination of the issue of safety significance without all of the trappings of a full-blown hearing. Rather than reining in the Appeal Board, the Commission should be encouraging the Board in its efforts to consider all the evidence carefully and to have a more complete record before deciding upon a motion to reopen.

Unfortunately, the Commission feels compelled to apply its decision in Waterford to this case. Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1 (1986). I disagreed with that decision as well, and for good reason. That decision denies Board members the opportunity to obtain answers to questions raised as a resu of the parties' filings on a motion to reopen. The Waterford decision, when combined with

the Commission's standards for reopening and the Commission's rules on raising issues sua sponte, ties the hands of the Boards. By setting such high standards in all of these areas, the Commission has made it extremely difficult for an intervenor to raise new issues.

In addition, the Commission has now made it virtually impossible for the Boards to obtain additional information, which is not in the parties' initial filings, in order to satisfy themselves that an issue does or does not present a significant safety issue. Thus, in the future, whether a Board can consider a safety issue in some detail before ruling on a motion to reopen will depend upon how adept a particular intervenor is in meeting these stringent pleading requirements on the first round of pleadings. If the intervenor does not make an open and shut case in his

initial pleading, he will not get a second chance. Further, the Board will not be permitted to ask for additional information no matter how many questions the Board has, unless the Board grants the motion to reopen. This could have either of two results, neither of which is particularly beneficial. Either the Boards will read the Waterford and Perry orders strictly and will not grant a motion to reopen without a seemingly irrefutable pleading from the intervenor, in which case fewer issues will be resolved with input from the public. Or, rather than treat the issue superficially, the Boards will be more inclined to grant a motion to reopen if they have unanswered questions and thus begin a full-blown hearing. The action of the Appeal Board here seems to be a sensible compromise to avoid either extreme.

The Commission's devotion to technical pleading requirements with regard to motions to reopen is certainly understandable because proceedings must come to an end sometime. Such devotion to the Commission's rules and precedents might even be admirable, if it were applied uniformly to all parties. However, when I contrast this case with the Commission's recent orders in the Braidwood proceeding, it is apparent that the Commission does not require the same level of performance from all parties. (See, Commonwealth Edison Company (Braidwood Station, Units 1 and 2), Docket Nos. 50-456 and 457, Commission Orders dated December 5, 1985, and March 20, 1986 (both unpublished). In that case the Commission went out of its way to give the applicant a second chance to make

its case on a motion on which it clearly had not met its burden as movant.

Aside from all of the above, however, the Commission's decision today suffers from an additional infirmity. At a minimum, the Commission should in this case have heard from the parties before deciding whether to issue this order. The Commission should not have interposed itself into the Perry proceeding, without being asked by any party, and then summarily disposed of both the Appeal Board "mini-hearing" and the intervenor's motion to reopen. Allowing the parties an opportunity to speak for a few minutes on this issue at the Commission meeting, during which the Commission usually decides whether to issue a full-power license, is hardly an adequate substitute for a close look at this issue by the Appeal Board.

28 U.S.C. § 2342

Jurisdiction of court of appeals

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

42 U.S.C. § 2239

Hearings and judicial review

(a) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal

Register, on each application under section 2133 or 2134(b) of this title construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty day's notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a

determination by the Commission that the amendment involves no significant hazards consideration.